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IN THE

Supreme Court of the United States

1940 TERM

No. 530

CHARLES RICHMAN, *Petitioner,*

vs.

ANNE NIELSEN, *as* Administratrix of the Estate of Pearl G. Nielsen, Deceased, *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I.

STATEMENT OF FACTS

For the sake of brevity, we refer this Court for a Statement of Facts to the majority opinion as rendered by the Circuit Court of Appeals in this case. This statement of facts is not controverted in the dissenting opinion. See *Nielsen, etc. vs. Richman,* 114 Fed. (2) 343, Advanced Sheets Federal Reporter, October 14, 1940.

II.

THIS IS NOT A CASE FOR THE GRANTING OF A WRIT OF CERTIORARI

See *Chicago & Northwestern Railroad vs. Osborne,* 146 U. S. 354, 13 Sup. Ct. Rep. 281, where the headnote states the rule:

> "The Supreme Court will not issue a writ of certiorari to review a judgment of the Circuit Court of Appeals reversing a judgment of the Circuit Court and remanding the cause for further proceedings; for such a judgment is not final, and the Supreme Court is, therefore, without jurisdiction to revise it."

See also the case of *Forsyth vs. City of Hammond,* 166 U. S. 506, 17 Sup. Ct. Rep. 665. This case is cited by Petitioner. This Court in that case said:

> "In order that this Court may properly grant a writ of certiorari that the decision of the Circuit Court of Appeals must be in that class 'in which the decision of that Court is declared a finality'."

Except in extraordinary cases, the writ is not issued until final decree.

> *American Constr. Co. vs. Jacksonville, T. & K. W. R. Co.,* 148 U. S. 372, 378, 384, 37 L. Ed. 486, 489, 491, 13 Sup. Ct. Rep. 758.
>
> *The Three Friends,* 166 U. S. 1, 49, 41 L. Ed. 897, 913, 17 Sup. Ct. Rep. 495.
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> *The Conqueror,* 166 U. S. 110, 113, 41 L. Ed. 937, 939, 17 Sup. Ct. Rep. 510.
>
> *Denver v. New York Trust Co.,* 229 U. S. 123, 133, 57 L. Ed. 1101, 1120, 33 Sup. Ct. Rep. 657.

This is not a case where a final judgment was rendered. Petitioner never introduced any evidence in the Lower Court. The Circuit Court of Appeals simply directed that

> "The case is reversed and remanded for a new trial."

This Court has never adopted a rule, as inferred by Petitioner, that where a decision was rendered by a District Judge sitting as a Judge of the Circuit Court of Appeals, and approved by one of the other regular Circuit Judges, that because of a dissent by one Circuit Judge, that the fact of such a dissent is the basis for granting certiorari. A District Judge, when so sitting, is a Judge of the Circuit Court of Appeals, if otherwise qualified.

See U. S. C. C. A. 28, Section 216, where the Statute states that when District Judges so sit, that they "*sit as Judges of the Circuit Court of Appeals* within their respective Circuits." The granting of the writ in the case of *Forsyth vs. City of Hammond* was not on that ground.

See Rule 38 of the Rules of this Court, and Subdivision 5 thereof, where it is stated that the writ

> "Will be granted only where there are special and important reasons therefor."

This is not a case in the class provided in Subdivision 5.

To grant the writ in this case would be to circumvent the purpose of the law creating the Circuit Court of Appeals, or as said by Judge Brewer in *Chicago & Northwestern Railroad Co. vs. Osborne, supra,*

> "If carelessly exercised, might defeat the very thought and purpose of the Act creating the Circuit Court of Appeals. **** It might burden the docket of this Court with cases which it was the intent of Congress to terminate in the Circuit Court of Appeals."

The Petitioner should not complain. This case was started in the Courts of South Dakota. He removed the case from the State Court. See printed transcript of record in Circuit Court of Appeals, pages 67-79. Removal was only on the ground of diversity of citizenship. The application for the writ should be denied.

III.

THE DECISION OF THE CIRCUIT COURT OF APPEALS SQUARES WITH THE DECISION OF ALL COURTS WHERE THE QUESTION HAS BEEN CONSIDERED AND SQUARES WITH THE LANGUAGE OF THE SOUTH DAKOTA UNIFORM MOTOR VEHICLES ACT, SECTION 44.0321, SDC 1939, AND SECTIONS 44.4318 AND 44.0303, AND SUBDIVISION 11 THEREOF, SDC 1939.

The South Dakota Legislature in adopting the Uniform Motor Vehicles Act, omitted from Section 44.0321, the following:

> "Such signs shall be placed as nearly as practicable and stops shall be made at the place where such cross-streets meets the prolongation of the nearest property line of such highway."

In every case where a Court has been called upon to construe the Uniform Motor Vehicles Act or an Act similar to the South Dakota Act, Section 44.0321, where the place of stopping is not designated, the Courts construction is the same as that adopted by the Circuit Court of Appeals. No decision to the contrary can be found and none has been cited by Petitioner.

For the language of the Uniform Motor Vehicles Act, with the part included, that is omitted in the South Dakota Statute, see Uniform Laws Annotated, under Uniform Motor Vehicles Act, page 46, Section 48, and Martindale—Hubbell Law Directory, Volume 2, Law Digest, for the year 1940, under the title "Uniform Act Regulating Traffic On Highway," Section 48.

The following cases sustain the opinion of the Circuit Court of Appeals:

Dickel vs. Mathers, 213 Ia. 76, 238 N. W. 615.
McCulley vs. Anderson, 119 Neb. 105, 227 N. W. 312.
Bell vs. Pickett, 178 Minn. 540, 227 N. W. 854.
Johnson vs. Selfe, 190 Minn. 269, 251 N. W. 525.
Jacobsen vs. Ahsay, 188 Minn. 179, 246 N. W. 690.
Anderson vs. Detroit Motor Bus Co., 239 Mich. 390, 214 N. W. 172.

The South Dakota Supreme Court has never construed the Statute but has affirmed the principle as announced in the decision of the Circuit Court of Appeals.

Litz vs. Arbeiter, 57 S. D. 481, 233 N. W. 914.
Pfleger vs. Wilhelm, 65 S. D. 646, 274 N. W. 872.
Pooley vs. Leath, 62 S. D. 554, 255 N. W. 153.
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Ziegler vs. Ryan, 65 S. D. 110, 271 N. W. 767.
Campbell vs. Jackson, 65 S. D. 154, 272 N. W. 239.

The principle has been approved by this Court in the case of *Pokora vs. Wabash Railroad Co.,* 292 U. S. 98, 54 S. Ct. Rep. 580, in an able opinion by Judge Cardozo. There was a limited view. The Court said:

> "A jury, *but not the Court,* might say that with faculties thus limited, he should have found some other means of assuring himself of safety before venturing to cross. **** What is suitable for the driver caught in a mesh where the ordinary safeguards fail him is for the judgment of the Jury."

The following cases are in point under the same or similar circumstances. The issue of contributory negligence is for the jury as held by the Circuit Court of Appeals.

Putnam Memorial Hospital vs. Allen, 34 Fed. (2) 927. (Circuit Court of Appeals Second Circuit.)

Pline vs. Parsons, 231 Mich. 466, 204 N. W. 131., the facts were very similar. The Michigan Court said:

> "Having the opinion that Deceased was not bound at his peril to discover Defendant's car was approaching at an excessive and unlawful speed, we decline to hold Deceased guilty of contributory negligence as a matter of law in attempting in such circumstances to cross the trunk line."

Adams vs. Canfield, 263 Mich. 666, 248 N. W. 800.

Calhoon vs. D. C. & E. Mining Co., 202 Mo. App. 564, 209 S. W. 318.

Page vs. Cudahy Packing Co., (Cal.) 87 Pac. 913.

Primock vs. Goldberg, 161 Minn. 160, 200 N. W. 920.

Nelson vs. Klemm, 210 Wis. 432, 245 N. W. 657.

Pilcher vs. Lodwig, 194 Wis. 535, 217 N. W. 320.

Hein vs. Wendlandt, 210 Wis. 139, 240 N. W. 815.

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Brun vs. Hammermeister, (Wash.) 14 Pac. (2) 700.

Clark vs. DeBeer, (La. Ap. 1939) 188 So. 517.

Crocker vs. Johnson, (Cal.) 94 Pac. (2)214.

Taxi Cab Co. vs. Ottenritter, 151 Md. 525, 135 Atl. 587.

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LeChance vs. Meyer, 98 Vt. 491, 129 Atl. 172.

Briggs vs. Koyer, 138 Cal. Ap. 487, 32 Pac. (2) 649.

Stryker vs. Hastie, 131 Ore. 283, 282 Pac. 1087.

Hayward vs. Wolbrecht, (1940) 293 N. W. 246 (Minn.).

Norling vs. Stempf, 293 N. W. 250 (1940 Minn.).

Kraus vs. Saffert, 293 N. W. 253. (1940 Minn.).

In the latter case the Court said:

"Plaintiff is not to be held guilty of contributory negligence in not seeing Defendant, who was out of sight when a reasonable observation was made, and whose unanticipated and excessive speed made unsafe a crossing that appeared to be safe. **** There is no rule of law requiring the driver of a car to look a second time after he has determined by reasonable observation that it is safe to cross an intersection. Due care is not determined by the number of times the driver looked, or how often, or when, or from where."

IV.

PETITIONER'S POINTS 2 AND 3, PAGES 5 AND 6, AND CASES CITED, HAVE NO APPLICATION TO THE FACTS IN THIS CASE AND ARE NOT CONTRARY TO THE DECISIONS OF THE CIRCUIT COURT OF APPEALS.

No Court, as a matter of law, can determine the point when an observation can most effectively be made, when two moving vehicles at different speeds are approaching an obstructed or partially obstructed intersection. That is for the jury. The cases cited under said two points, are not in point.

In *Jameson vs. Gerth,* 61 S. D. 514, 249 N. W. 921, the Plaintiff claimed to have seen an approaching car three-fourths of a block away, but made no stop. There were no obstructions. The Plaintiff drove into the side of Defendant's car. This is not in point.

Anderson vs. Huntwork, (S. D.) 284 N. W. 775. The Plaintiff said:

"I could see a block. My view was unobstructed. I could see the whole block. There was nothing to block my view at all. **** The evidence indicates Respondent was driving along without paying any attention to cars approaching the intersection."

In *Gumm vs. Koepke,* (Wis.) 278 N. W. 447, the Court held that contributory negligence was a jury question.

In *Hittle vs. Jones,* 217 Ia. 598, 250 N. W. 698, we find the Iowa law the reverse of the South Dakota law in reference to burden of proof in case of contributory negligence. In Iowa it is on the Plaintiff. In South Dakota it is on the Defendant. In Iowa, under the present statute the party on the arterial has the absolute right-of-way.

In the case of *Paluczka vs. Jones,* 245 N. W. 655, the decision is based on a particular statute relative to speeds. The deceased did not stop at the stop sign and did not have the right-of-way.

In *Miller vs. Stevens,* 63 S. D. 10, 254 N. W. 152, the South Dakota Court did not even touch on the question involved here.

Not a case has been cited contrary to the decision of the Circuit Court of Appeals in this case. None is cited even in the dissenting opinion. There has been "uniformity of interpretation" in the construction of the law in reference to right-of-way under statutes the same or similar to the South Dakota statute. There has likewise been uniformity in holding under similar facts that contributory negligence is a matter for the jury, and not for the Court, regardless of the language of the statute. No question is involved in this case that concerns anyone other than the litigants themselves. It is important to the litigants only, and no one else. The rule applied by the Circuit Court of Appeals squares with all decisions, State and Federal.

V.

DOCTRINE OF LAST CLEAR CHANCE

The doctrine of last clear chance is a well known and well established doctrine. It is recognized in the State of South Dakota, as shown by the cases cited by Petitioner, and by the quotations appearing in Judge Bell's opinion. Its application to the facts in the case at bar is in accord with the South Dakota decisions. There was no attempt by

the Circuit Court of Appeals to establish any new rule of law applicable to the doctrine of last clear chance. That being the case, the application of the doctrine is left to be applied to the circumstances in each particular case, and the facts in each particular case. The conceded facts and circumstances, as testified to by the Petitioner, appear in the printed record, 24-25:

> "Q. And this other car (referring to decedent's car) was coming into that intersection without any visible signs of stopping there?
>
> A. That is right.
>
> Q. When you first saw it, you took your foot off the gas and you didn't see that that car was going to stop at all, it didn't slow its speed down?
>
> A. No."

The evidence shows that Petitioner drove his car to the wrong side of the highway, where the collision occurred. The photographs show that had he stayed on his side of the highway, he had ample space to pass and coulld have easily avoided the accident.The general doctrine was directly applicable.

See annotations in 92 A. L. R. 28, under the case of *Smith vs. Gould,* and 119 A. L. R. on page 1041. There is a complete review of the authorities and of the doctrine; also a classification of the decisions. The doctrine is directly applicable under the facts here.

See also 5 N. C. C. A. (N. S.) 83.

See *Clark vs. Boston & Main R. R.,* 87 N. H. 36, 173 Atl. 368, where the Court, discussing the rule, said:

> "The circumstances as disclosed by the evidence may be such that the jury would be justified in disregarding direct testimony of lack of actual knowledge and find in spite of that testimony that the one to be charged would in actual fact have knowledge of the other's presence and of the latter's want of appreciation of impending peril."

This Court approves the doctrine of last clear chance. See *Kansas City Southern Railroad Co. vs. Ellzey*, 275 U. S. 236, 48 Sup. Ct. Rep. 80 and the much quoted definition enunciated by Justice Stone.

See *Chunn vs. City & S. Railroad Co.*, 207 U. S. 302, 28 Sup. Ct. Rep. 63.

SUMMARY

No reason exists for granting the writ in this case.

First: The judgment is not a final judgment. There is nothing extraordinary about this case.

Second: There is no conflict between the decisions of the Federal Courts and the decisions in South Dakota.

Third: The decisions in the State Courts of the Eighth Circuit all square with the opinion rendered by the Circuit Court of Appeals and square with the language of the South Dakota Act.

Fourth: The Circuit Court of Appeals in its decision did not attempt to establish any new rule of law applicable to the doctrine of last clear chance contrary to South Dakota decisions or any other decisions. It left to the Trial Court the right to instruct under the doctrine, as announced by the South Dakota Court and the determination of the question by the jury.

No reason exists why the Writ of Certiorari should be issued in this case.

Respectfully submitted,

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